PUBLIC PROSECUTOR

v.

CHE AHMAD SHAFIE

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
ABDUL HAMID OMAR CJ (MALAYA)
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
EUSOFFE ABDOOLCADER SCJ
[CRIMINAL REFERENCE NO. 5 OF 1987]
5 NOVEMBER 1987

CRIMINAL LAW AND PROCEDURE: *Dangerous Drugs - Offence of trafficking - Section 39B Dangerous Drugs Act 1952 - Charge did not specify words "on his own behalf or on behalf of any other person" - Whether charge is defective.*

In this case, two questions were reserved for determination under s. 66 of the Courts Judicature Act 1964:

1. Whether a charge under s. 39B of the Dangerous Drugs Act 1952 (Revised 1980) is defective in law if it is not specified therein the words "on his own behalf or on behalf of any other person".

2. If the answer to Question 1 is in the affirmative, whether, having regard to the presumption under s. 37(da) of the Act, such defect is curable by s. 422 of the Criminal Procedure Code.

Held:

[1] On the evidence relied on by the prosecution in this case the charge was sufficient and valid. In fact in every case where an accused is charged under s. 39B of the Act and the evidence relied on is possession, custody and control of a dangerous drug of an amount which invokes the statutory presumption under s. 37(da), the omission of the words "on his own behalf or on behalf of any other person" cannot be said to vitiate the charge and is not fatal to the charge.

[2] Therefore the answer to Question 1 is in the negative and Question 2 did not arise.

[Answered in the negative.]

Cases referred to:
Rex v. Barraclough [1906] 1 KB 204
Hashim bin Mat Isa v. Public Prosecutor [1950] 16 MLJ 94
Ong Ah Chuan v. Public Prosecutor [1981] 1 MLJ 64
Wong Kee Chin v. Public Prosecutor [1979] 1 MLJ 157

Legislation referred to:
Courts of Judicature Act 1964, s. 66
Criminal Procedure Code, s. 422
Dangerous Drugs Act 1952, ss. 2, 37(da), 39B, (1)
Penal Code, ss. 300, 302
Misuse of Drugs Act 1973 [Sing], ss. 3, 17

For the appellant - Abu Talib bin Othman, Attorney-General Malaysia.
For the respondent - Karpal Singh (Manjit Singh with him); M/s. Manjit Singh & Co.

JUDGMENT

Salleh Abas LP:

The two questions reserved for determination under s. 66 of the Courts of Judicature Act 1964 are as follows:

(1) Whether a charge under s. 39B of the Dangerous Drugs Act 1952 (Revised 1980) is defective in law if it is not specified therein the words "on his own behalf or on behalf of any other person".

(2) If the answer to question 1 is in the affirmative, whether, having regard to the presumption under s. 37(da) of the Act, such defect is curable by s. 422 of the Criminal Procedure Code (FMS Cap. 6).

For a proper perspective of the questions posed, it would be best that the relevant provisions of the Dangerous Drugs Act 1952 be reproduced:

(1) The word "trafficking" is defined in s. 2 of the Act as follows:

> "Trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

(2) There is a statutory presumption in respect of cannabis in s. 37(da) of the Act which reads as follows:

> 37(da) any person who is found in possession of-
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> (vi) 200 grammes or more in weight of cannabis;
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> (vii) 200 grammes or more in weight of cannabis resin;
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> (viii) a total of 200 grammes or more in weight of cannabis and cannabis resin;
>
> ...
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

(3) Section 39B(1) of the Act creates the offence and *inter alia* provides that no person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia traffic in a dangerous drug.

It is elementary but nevertheless fundamental that the charge against an accused person must carry the ingredients of the offence and which must be proved against him. According to the charge against the respondent here what had to be proved was that he was in possession, custody and control of the two paper bags containing 2,245 grammes of cannabis on the date and time as specified in the charge. Once that is proved the presumption under s. 37(da) operates and the offence of trafficking is completed under s. 39B of the Act. The words **"on his own behalf or on behalf or any other person, whether or not such other person in Malaysia"** appearing in s. 39B of the Act are merely to emphasise that an offence is committed by any person who **traffics** in dangerous drugs **whether** on his own behalf or on behalf of any other person **whether** the person is in or outside Malaysia. In a sense they are *ex abundanti cautela.* These words do not constitute an element which is essential to complete the offence and may be omitted from the charge without affecting the legality of the charge. On the charge as framed against the respondent in this case they do not even require proof to complete the offence.

Rex v. Barraclough [1906] 1 KB 204 was a case stated for consideration in respect of the omission of certain words from the charge. The accused there was indicted for publishing a libel. One of the objections raised before the Judge in the first instance was that the indictment relating to the publication of an alleged defamatory libel was bad for not setting out the words of the alleged libel. That objection was upheld. The other objection to the charge was that since the manifest intention of the framer was to charge for the publication of a defamatory libel and not of an obscene libel, the indictment must fail and could not be construed as a charge of obscene libel. It was argued also that the indictment for alleged obscene libel was in any case bad by reason of the omission of the words "to the manifest corruption of the morals of his Majesty's subjects". The Judge ruled that this objection could not stand holding that an obscene libel *ex vi terminorum* connotes that it is to the manifest corruption of morals. This ruling was subsequently upheld. It was a criminal offence to publish unlawfully obscene matter and the gist of the offence is the unlawfulness of the publication. If the matter published is obscene there is an inference of law that its tendency is to corrupt public morals, and there is no necessity to aver it in the indictment. The rationale is that the omission of superfluous words from the charge does not vitiate the charge.

In *Hashim bin Mat Isa v. Public Prosecutor* [1950] 16 MLJ 94 the accused was convicted of murder under s. 302 of the Penal Code. On appeal the conviction was quashed on the grounds of total non-direction by the trial Judge on the ingredients of the offence. In the charge the word "intentionally" was inserted preceding the words "causing the death". Murder is defined in s. 300 of the Penal Code as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or
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> Secondly - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or
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> Thirdly - If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
>
> Fourthly - If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

Willan CJ said in the Court of Appeal judgment at p. 95:

> The presence of the word "intentionally" suggests that the charge in the present case was copied from the form set out in text books on Indian Penal Code. To include the word "intentionally" in a murder charge is unnecessary, and may cause confusion and embarrassment where the prosecution, at some stage of the trial, find they have to rely for instance on the fourth definition of the offence of murder, which entails proof of knowledge, and not intention.

In *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64 the accused was originally charged under the Singapore Misuse of Drugs Act 1973. Section 3 of the Singapore Act creates the offence of trafficking in a controlled drug and the words "on his own behalf or on behalf of any other person, whether or not such other person is in Singapore" also appear in that section. There is also a statutory presumption contained under s. 17 of the Singapore Act similar to ours. The charge against Ong Ah Chuan also omitted the words "on his own behalf" but no adverse comments came from the Privy Council on the charge. What is pertinent is that the Privy Council approved the passage in the judgment of the Singapore Court of Criminal Appeal in *Wong Kee Chin v. Public Prosecutor* [1979] 1 MLJ 157 on the operation of the statutory presumption. The passage read:

When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the term) was two or more grams, a rebuttable presumption arises under s. 15(2) that the accused had the said controlled drug in his possession for the purpose of trafficking. **Proof of the act of transporting plus the presumption under s. 15(2) would constitute a** *prima facie* **case of trafficking which if unrebutted would warrant his conviction**. In those circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him.
[emphasis provided]

Thus on the evidence relied on by the prosecution in this case the charge was sufficient and valid. In fact in every case where an accused is charged under s. 39B of the Act and the evidence relied on is possession, custody and control of a dangerous drug of an amount which invokes the statutory presumption under s. 37(da), the omission of the words "on his own behalf or on behalf of any other person" cannot be said to vitiate the charge and is not fatal to the charge.

Therefore our answer to Question 1 is in the negative. Question 2 does not arise.

Also found at [1988] 1 CLJ 36